

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

v.

DROEL JARED ENCARNACION,

Defendant.

* * * * *
Criminal Action No. 18-cr-10410-ADB

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

BURROUGHS, D.J.

On November 7, 2018, a grand jury returned an indictment charging Droel Jared Encarnacion (“Encarnacion”) with conspiring to distribute (Count I) and possession with intent to distribute (Count II) 500 grams or more of cocaine. [ECF No. 3 at 1–3]. Currently pending before the Court is Encarnacion’s motion to suppress evidence obtained from a Title III wiretap interception order that was issued on August 2, 2018, and extended on August 31, 2018, and a warrantless car stop that took place on September 18, 2018. [ECF No. 76]. Encarnacion argues that because the affidavit submitted in support of the August 2, 2018 order failed to establish probable cause and “necessity,” it was in violation of 18 U.S.C. §§ 2515 and 2518 and the Fourth Amendment. [ECF No. 76 at 1]. For the reasons set forth below, the motion to suppress [ECF No. 76] is DENIED.

I. BACKGROUND

In 2017, federal investigators were investigating an international drug trafficking organization that was importing drugs into the United States from countries in South America. During this investigation, a phone call was intercept during which defendant Robin Suazo was

heard speaking in what the investigators believed to be coded language about moving a large amount of fentanyl from Mexico to the United States. [ECF No. 77-1 at 12]. Investigators also received corroborating information from two sources of information, two cooperating defendants, and two confidential sources that confirmed that Suazo was orchestrating a large drug distribution conspiracy centered in Massachusetts. [ECF No. 77-1 at 20, 23, 24].

Following the receipt of this information about Suazo and subsequent investigation, on August 2, 2018, DEA Task Force Officer Michael Patterson applied for authority to wiretap two target telephones, which Judge Stearns approved. [ECF No. 77-1 at 60]. Target Telephone #1 was believed to be used by Suazo. That wiretap application described the investigation into the apparent drug distribution conspiracy involving Suazo, including the use of confidential sources, surveillance of Suazo, search warrants, and an analysis of telephone records and public records. [Id. at 40].

The application detailed the background of the investigation, the identification of Suazo, and the relevant information received from confidential informants and other sources of information that led investigators to believe that the target phone was being used to coordinate a drug-distribution conspiracy. Source of Information 1 (“SOI-1”) told investigators that Suazo was a high-level cocaine dealer in Massachusetts and that he had previously purchased cocaine from Suazo. [Id. at 20]. SOI-1 additionally provided Suazo’s phone number. [Id.]. Source of Information 2 (“SOI-2”) similarly said that he had purchased 200 grams of fentanyl from Suazo and also identified Suazo’s phone number. [Id. at 22]. Source of Information 3 (“SOI-3”) identified Suazo as the leader of a drug trafficking organization in Massachusetts, which sold up to fifteen kilograms of cocaine, heroin, and fentanyl every two weeks, and moved drugs through

Massachusetts, Rhode Island, and New York. [Id. at 23]. SOI-3 said that Suazo had been dealing drugs for twenty years. [Id.].

According to Source of Information 4 (“SOI-4”), Suazo could sell large quantities of cocaine, heroin, and fentanyl. [Id. at 25]. SOI-4 also identified several telephone numbers that Suazo used in connection with his drug operation, one of which was Target Telephone #1. [Id. at 24]. SOI-4 told investigators about an occasion where he had intended to sell three kilograms of fentanyl to Suazo, but Suazo walked away from the transaction because he had not liked the quality of the fentanyl. [Id. at 24–25]. SOI-4 also said that he was present at other meetings with Suazo where Suazo sampled fentanyl to determine if he wanted to make a purchase. [Id. at 28, 30–31]. One of these meetings took place on the morning of April 29, 2018. [Id. at 27–28]. Location monitoring information for Target Telephone #1 corroborated the location of the meeting. [Id. at 29]. Additionally, pen register information confirmed that Target Telephone #1 received a number of calls from SOI-4 before and after the meeting, which corroborated SOI-4’s account of calling Suazo’s phone to plan the meeting, as well as to plan a subsequent meeting for the next day. [Id. at 29].

Additionally, SOI-4 provided information about Suazo purchasing a kilogram of fentanyl during a drug transaction that took place in Suazo’s car on May 1, 2018. [Id. at 32]. Toll records corroborate that Suazo used Target Telephone #1 to plan the May 1 meeting with SOI-4, as well as during the meeting. [Id. at 31–32]. In response to the information provided by SOI-4, agents got a search warrant for the car in which the meeting supposedly took place, seized the vehicle, and recovered a kilogram of fentanyl from the backseat of that car. [Id. at 33]. Toll records also corroborate SOI-4’s account of Suazo calling other co-conspirators to determine what happened to the car. [Id. at 33–34].

In addition to the Source information detailed above, agents used T-Mobile records and call dialing data from a pen trap and trace on Target Telephone #1 to corroborate Source information and to establish that Suazo was in frequent contact with other known drug traffickers, including around the time of the seizure of the kilogram of fentanyl. [ECF No. 77-1 at 26–37, 50]. According to the toll and pen register records, between April 18, 2018 and mid-July 2018, in addition to the communications involving the SOIs, Target Telephone #1 was extensively used to communicate with other known drug traffickers. [Id. at 34–37].

As required by the statute, the affidavit also included a “necessity” section that detailed what investigative techniques had been tried or were unlikely to succeed. [Id. at 39–45]. The necessity section discussed the use of confidential sources, undercover agents, controlled purchases, physical and video surveillance, cell site location information, GPS tracking devices, telephone records, pen registers, trap and trace devices, search warrants, other wiretaps, trash and mail searches, financial investigations, and grand jury investigations. [Id. at 40–55]. The affidavit explained that these methods had already been tried or would likely be ineffective, and concluded that the wiretap was necessary to achieve the goals of the investigation. [Id.].

II. STANDARD OF REVIEW

“Title III provides a comprehensive scheme for the regulation of electronic surveillance, prohibiting all secret interception of communications except as authorized by certain state and federal judges in response to applications from specified federal and state law enforcement officials.” United States v. Rodrigues, 850 F.3d 1, 6 (1st Cir. 2017) (quoting Dalia v. United States, 441 U.S. 238, 249 (1979)). “The initial determination as to compliance with the stringent standards for issuing a wiretap authorization, 18 U.S.C. § 2518(1), is made by the judge to whom the application is made.” United States v. Melendez-Santiago, 644 F.3d 54, 56 (1st Cir. 2011).

Because the Court is reviewing the wiretap order of another judge, it “must determine ‘if the facts set forth in the application were *minimally adequate* to support the determination that was made.’” United States v. Santana, 342 F.3d 60, 65 (1st Cir. 2003) (emphasis added) (quoting United States v. Villarman-Oviedo, 325 F.3d 1, 9 (1st Cir. 2003)).

III. DISCUSSION

Before authorizing a wiretap under Title III, the issuing judge must find probable cause to believe that “an individual is committing, has committed, or is about to commit” a criminal offense, that “communications concerning that offense will be obtained through such interception,” and that the wiretap is necessary because “other investigative techniques have failed, appear unlikely to succeed or are too dangerous.” United States v. Rose, 914 F. Supp. 2d 15, 27 (D. Mass. 2012) (quoting 18 U.S.C. § 2518(3)(a)–(b)).

“[W]here law enforcement authorities fail to comply fully with the requirements of Title III, suppression may be merited ‘if the communication was unlawfully intercepted; the order of authorization or approval’ under which it was intercepted is insufficient on its face; or the interception was not made in conformity with the order of authorization or approval.” Rodrigues, 850 F.3d at 6 (quoting 18 U.S.C. § 2518(10)(a)).

A. Probable Cause

“To show sufficient probable cause an affidavit in support of a wiretap application must demonstrate 1) probable cause to believe that ‘an individual is committing, has committed, or is about to commit’ a criminal offense and 2) probable cause to believe that ‘communications

concerning that offense will be obtained through such interception.”” United States v. Serrano, 632 F. Supp. 2d 100, 105 (D. Mass. 2009) (quoting 18 U.S.C. § 2518(3)(a)–(b)).

The probable cause determination requires the Court to consider whether the evidence relied on by the affidavit is stale. “Information contained in an affidavit is stale if it established probable cause at some point in the past but does not support probable cause at the time of the warrant’s issuance.” United States v. McLellan, 792 F.3d 200, 210 (1st Cir. 2015). “[C]ourts confronting suppression motions do not measure the timeliness of collected information mechanically, merely counting the number of days elapsed.” United States v. Schaefer, 87 F.3d 562, 568 (1st Cir. 1996). Instead, the Court must consider “the nature of the information, the nature and characteristics of the suspected criminal activity, and the likely endurance of the information.” United States v. Morales-Aldahondo, 524 F.3d 115, 119 (1st Cir. 2008) (citation and internal quotation marks omitted).

The affidavit more than adequately established probable cause to believe that Suazo was engaged in drug trafficking from at least February 2017 through July 2018. This was established through information from an earlier wiretap as well as multiple sources of information, including confidential sources and cooperating defendants and was corroborated by the seizure of a kilogram of fentanyl from Suazo’s car. “[T]he First Circuit has explicitly held that unnamed informants can form the basis for probable cause so long as the issuing court can assess the credibility of the informant’s information.” United States v. Noonan, No. 2:13-cr-00153, 2014 WL 4258717, at *8 (D. Me. Aug. 27, 2014) (citing United States v. Barnard, 299 F.3d 90, 93 (1st Cir. 2002)). There was therefore probable cause to believe that Suazo was committing drug offenses. See, e.g., United States v. Montegio, 274 F. Supp. 2d 190, 199 (D.R.I. 2003) (“[T]he single most powerful fact in the Government’s favor is that five of the six confidential

informants who provided the essential basis to support probable cause in the first affidavit represented that they had *personal knowledge* that the Defendant was a high-volume drug dealer Moreover, some of these Sources provided information respecting the Defendant's use of the subject cellular telephone numbers for drug distribution-related purposes”).

Further, the affidavit established probable cause to believe that the Target Telephone was being used to facilitate these drug offenses. “[T]he question is not probable cause to believe that drugs, guns, or other contraband is still located at a particular place, but probable cause to believe that the content of telephone calls will yield evidence of criminal activity.” United States v. Ford, 183 F. Supp. 3d 22, 35 (D.D.C. 2016). Multiple sources of information reported that Suazo was using the target phone in connection with drug distribution. For example, SOI-4 told investigators that Suazo used Target Telephone #1 multiple times when planning drug deals in April and May. Toll records and cell site location information corroborated the information provided by SOI-4 about the use of the Target Telephone. Phone records further showed that Suazo used Target Telephone #1 before, during, and after his purchase of the kilogram of fentanyl that was seized by law enforcement, including multiple times right after the car was seized, which was consistent with SOI-4’s account that Suazo was calling co-conspirators to determine where the car had been taken. More generally, toll information confirmed Suazo’s long-standing participation in drug trafficking and call dialing data from a pen trap and trace on Target Telephone #1 showed that Suazo was in frequent contact with suspected drug dealers consistently from April through mid-July 2018, with the Target Telephone being used as recently as July 20, 2018, just two weeks before the relevant wiretap interception order was signed. [ECF No. 77-1 at 34–37]. The affidavit was therefore more than “minimally adequate” to provide

probable cause to believe that Suazo was using the target phone in furtherance of a drug trafficking conspiracy.

B. Necessity

Having determined that the affidavit provided probable cause to believe that evidence of Suazo's drug distribution conspiracy would be discovered by a wiretap on Target Telephone #1, the Court must next determine whether the affidavit also demonstrated that the wiretap was necessary. A wiretap is "not to be routinely employed as the initial step in criminal investigation." United States v. Giordano, 416 U.S. 505, 515 (1974). The necessity requirement is "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Rivera-Rosario, 300 F.3d 1, 18 (1st Cir. 2002) (citation and internal quotation marks omitted). Under § 2518(1)(c), the affidavit "should demonstrate that the government has made 'a reasonable, good faith effort to run the gamut of normal investigative procedures before resorting to means so intrusive as electronic interception of telephone calls.'" Villarman-Oviedo, 325 F.3d at 9 (quoting United States v. Hoffman, 832 F.2d 1299, 1306–07 (1st Cir. 1987)).

"[A] reviewing court must examine whether reasonable procedures were attempted (or at least thoroughly considered) prior to seeking a wiretap." United States v. Santana-Dones, 920 F.3d 70, 77 (1st Cir. 2019). "[T]he government is not required to show that other investigative methods have been wholly unsuccessful, nor must the government exhaust all other investigative measures before resorting to wiretapping." United States v. Cartagena, 593 F.3d 104, 109 (1st Cir. 2010). See also Villarman-Oviedo, 325 F.3d at 9 ("[I]t is not necessary . . . to show that other methods have been entirely unsuccessful."). "After all, an application for a wiretap will always have to disclose some meaningful level of previous success in order to satisfy the

probable cause requirement and justify further investigation.” Santana-Dones, 920 F.3d at 77.

The government must demonstrate “with specificity why ordinary means of investigation will fail; conclusory statements without factual support are not sufficient.” United States v. Lopez, 300 F.3d 46, 53 (1st Cir. 2002).

Here, the affidavit described the methods used by the agents during the investigation—including interviewing confidential sources, executing search warrants, surveilling Suazo, utilizing a telephone trap and trace, and searching public records—in an effort to flush out and prove the parameters of Suazo’s drug trafficking operation. [ECF No. 77-1 at 40]. The affidavit further discussed why those investigative techniques had been insufficient and explained why other available methods of investigation would likely be ineffective or dangerous. [Id. at 44–46]; see, e.g., United States v. Gordon, 871 F.3d 35, 46–47 (1st Cir. 2017) (finding that affidavit sufficiently demonstrated necessity when it explained the ineffectiveness of previous investigative methods, including phone toll record information and confidential sources, and the limits of other methods, including undercover agents, physical surveillance, or cameras). The affidavit therefore adequately established necessity by demonstrating that other investigative techniques had been tried and failed or were unlikely to obviate the need for interception.

IV. CONCLUSION

Accordingly, because the affidavit provided probable cause to believe that Target Telephone #1 was being used by Suazo in furtherance of the drug trafficking crimes and established that a wiretap was necessary to gather relevant evidence, Encarnacion’s motion to suppress [ECF No. 76] is DENIED.

SO ORDERED.

December 6, 2019

/s/ Allison D. Burroughs
ALLISON D. BURROUGHS
U.S. DISTRICT JUDGE